UNITED STATES OF AMERICA

BEFORE THIS NATIONAL LABOR RELATIONS BOARD

REGION 1

BOB'S TIRE CO., INC. AND B.J.'S SERVICE COMPANY, INC. (a Joint Employer)	Case No.:	01-CA-169949 01-CA-169956 01-CA-169959 01-CA-169968 01-CA-173156
And		01-CA-183476 01-CA-183482
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 328		01-CA-186451 01-CA-186462 01-CA-198705 01-CA-203805

BOB'S TIRE CO., INC.

POST HEARING BRIEF

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POST HEARING BRIEF FOR BOB'S TIRE CO., INC.

Pursuant to Section 104.42 of the National labor Relations board's Rules and Regulations, Bob's Tire co., Inc. ("Respondent") files the following Post Hearing Brief.

I. STATEMENT OF THE CASE

On or about May 29, 2018, General Counsel filed the Fifth Consolidated Complaint in this matter alleging, in pertinent part, that Bob's Tire Co., Inc. ("Respondent") had violated Sections 8(a)(1) and 8(a)(5) of the Act (the "Act") in refusing to bargain with the United Food and Commercial Workers International Union, Local 328 (the "Union") regarding subcontracting bargaining unit work to non unit employees and materially modifying a discretionary bonus system for unit employees.

The parties participated in a hearing in the matter on September 24, 2018 and September 25, 2018 with the Honorable Arthur Amchan presiding. General Counsel presented Carlos Gonzalez, a union representative/service agent for the Union, Tomas Ventura, a former employee at Respondent and Miguel Cosme Sam Perez, a current employee of Respondent. Respondent presented Robert Bates, the owner of Respondent.

The evidence presented at the hearing fails to establish that Respondent violated Sections 8(a)(1) or 8(a)(5) of the Act. Accordingly, Respondent respectfully requests that the General Counsel's Complaint be dismissed.

II. FACTUAL BACKGROUND

Respondent has been in the scrap tire recycling/repurposing business [Transcript pg. 181, lines 10-16] since 1976. [Transcript pg. 135, line 25] Throughout that time it has used a combination of direct employees and temporary agency supplied workers [Transcript pg. 228, lines 9-17] in its workforce.

On October 1, 2015, the Union was certified as the bargaining representative of the following unit; all full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc. working at Bob's Tire Co., Inc. location on Brook Street, New Bedford, MA, but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees and supervisors as defined in the Act.

In November 2015, Respondent, looking for an outlet for tires it did not make sense to shred due to a drop in the marketability for tire chips, began a new operation which it had not previously engaged in. [Transcript pg. 211, lines 3-25; pg. 212, lines 1-5] Due to a lack of availability of temporary employees from B.J.'s Service Company with whom it had contracted to supply workers, Respondent contracted with a company called Masis to provide workers to engage in the new operation.[1] [Transcript pg. 174, lines 1-10]

[1] The Masis workers engaged primarily in the new operation but occasionally filled in on other work if there was a shortage of B.J.'s workers. [Transcript pg. 176, lines 6-12]

The new venture operated for approximately a year but eventually did not work out and the Masis workers were no longer used after October, 2016.

The work performed by the Masis workers was work that Respondent had not done before. [Transcript pg. 215, lines 9-15] No bargaining unit members were laid off or lost any time as a result of the use of Masis workers. [Transcript pg. 217 lines 19-25; pg. 218, line 1] Respondent continued to hire some workers through BJ's during the period Masis' workers were used. [Transcript pg. 61, lines 8 -14]

In January of 2016, Respondent began paying discretionary bonuses to certain bargaining unit employees by check. [Transcript pg. 139, lines 24-25; pg. 140, line 9-20] Respondent had previously paid some limited bonuses in cash over the years it has been in business. The commencement of the payment of bonuses in January 2016 was done without bargaining with the Union. [Transcript pg. 141, lines 12-2] In September 2016, Respondent notified the Union of its intent to cease paying the bonuses. The Union did not respond to Respondent's notice of its intent to terminate the bonuses. The bonuses were terminated shortly thereafter. At the time the bonuses were terminated, Respondent was suffering substantial financial losses. [Transcript pg. 206, lines 9-11; pg. 208, lines 7-12; pg. 249 lines 11-20]

III. ARGUMENT

1. Masis Subcontracting

A. The work being done by the Masis employees was not bargaining unit work.

The work being done by Masis employees was primarily to create new products which involved work and equipment had never previously been done or used by bargaining unit

employees. [Transcript pg. 215, lines 9-15] The work involved cutting, wrapping and loading tire treads for a new market. [Transcript pg. 174, lines 6-10] It utilized equipment which was not used by the bargaining unit employees. The product being created was a new venture for Respondent which was being explored to resolve the problem of accumulating tire chips for which the market dried up. [Transcript pg 211, ines 3-25; pg. 212, lines 1-5] Respondent determined, from a business standpoint, that it could not continue reducing tires to chips only to result in an ever growing pile for which there was no market and which took up increasing space in Respondent's yard thereby impacting its operations, and changed the direction of the business to cutting tires for different products. [Transcript pg. 174, lines 6-10] The use of temporary employees from Masis in that new venture does not constitute subcontracting of bargaining unit work and did not require bargaining with the union. Respondent traditionally used temporary employees in its workforce. The source of those temporary employees varied overtime.

The use of Masis to provide temporary workers to perform work on a new venture for Respondent was consistent with the way Respondent conducted its business prior to the Union's presence, was done for economic reasons caused by the drop in the market for tire chips and was due to the lack of available employees from BJ's. No union employees suffered any adverse impact. See: *Equitable Gas Company v. National Labor Relations Board*, 637 F2d 980 (1981); *W. Mass Elec. Co. v. NLRB,* 573 F2d 101, 106 (1st Cir. 1978); *Puerto Rico Tel. Co. v. NLRB* 359

F2d 983, 987 (1st Cir. 1966). *Westinghouse Electric Corp. (Mansfield Plant)*, 150 N.L.R.B. 1574 (1965).[2]

B. Use of Masis provided workers was not subcontracting because they are considered Bob's employees which are included in the unit description.

The bargaining unit description in the case includes "all full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or BJ's Service Company, Inc. working at Bob's Tire Co., Inc. location on Brook Street, New Bedford, MA..." Included in the unit are workers employed by Respondent.

Respondent contracted with Masis to provide temporary workers, similarly to its contract with BJ's Service Company, Inc. The determination that the BJ's supplied workers were also employees of Respondent for purposes of the Act applies equally to the Masis supplied coworkers, namely that those workers are also considered Respondent's employees for purposes of the Act. Respondent directed the work, controlled the manner in which it was done and controlled the wages paid for the work. The workers took their direction from Respondent. [Transcript pg 114, lines 16-25; pg. 115, lines 1-6] See *Browning-Ferris Industries* 362 NLRB No 185 (2015).

[2] Respondent acknowledges that the question of adverse impact on existing employees has been determined not to be a factor in subcontracting claims. See: *Sociedad Espanola de Auxilio Mutuo Beneficiencia De P.R. a/k/a Hospital Espanola Auxilio Mutuo De Puerto Rico, Inc. v. National Labor Relations Board*, 414 F. 3d 158 (1st Cir. 2005); *Acme Die Casting* 315 NLRB 202 (1994). *Sociedad* was based on the board's determination in *Acme* that the Board's interpretation of the Act was entitled to deference. Respondent contends that the Board's decision in *Acme* was not consistent with the Act and potentially results in a penalty against an employer rather than a remedial action. See *Torrington Extend a Care Employer Ass'n v. NLRB*, C.A. 2 1994.

Because the Masis workers are considered Respondent's employees as well as BJ's employees under the Act and fall within the description of the bargaining unit, there was no subcontracting of bargaining unit work to nonbargaining unit workers. The Masis work was being performed by Respondent's employees and are included in the bargaining unit.

C. No bargaining unit employees were laid off or lost any work as a result of the use of Masis employees.

There was no evidence presented that any bargaining unit employee suffered any adverse consequence as a result of the Masis workers presence. On the contrary, the only evidence is that no bargaining unit employee was laid off or lost any time or benefits because of Masis. [Transcript pg. 217, lines 19-25; pg. 218 lines 1]

As noted, Respondent acknowledges that the presence of an adverse impact on bargaining unit employees is not currently considered a factor in determining subcontracting issues. See *Acme Die Casting*, supra; *Sociedad Espanola De Auxilio Mutuo Beneficiencia De P.R.*, supra. Nevertheless, Respondent contends that to ignore that factor in this matter may result in a penalty to Respondent beyond any remedial effect in violation of the Act. Here, the only evidence regarding the effect on bargaining unit employees is that no bargaining unit employee was laid off or lost any time because Masis workers were brought in to perform a function which Respondent had not previously engaged in.

The Act is remedial in nature. It provides no basis for the imposition of a penalty. If existing bargaining unit employees suffered no adverse effect from the alleged subcontracting,

there is nothing to remedy. To impose any type of back pay award when employees lost no pay will result in a windfall to those employees and would constitute the imposition of a penalty on Respondent which the Act does not support.

2. Bonuses

General Counsel contends that Respondent violated the Act (i) by starting to pay bonuses by check in January of 2016 when there were previous bonuses paid in cash and (ii) by terminating the check bonuses in September of 2106, all without bargaining with the Union.

Respondent concedes that it began paying bonuses in January, 2016, without bargaining with the Union, but denies that that represented a change in how any bonus were paid. There was no credible evidence presented that there was any large scale bonus program prior to January, 2016. Tomas Ventura testified that he had heard of bonuses being paid weekly but he did not receive one. [Transcript pg. 76, lines 2-13] He testified that he previously received a year-end bonus paid in cash but was not sure in which year he received a bonus. [Transcript pg. 86, lines 17-20] He did not report the bonus on any tax return and has no records whatsoever that indicate his receipt of a bonus. [Transcript pg. 87, line 11-21] He testified that other employees received year end (Christmas) bonuses but did not see and was not aware of anyone receiving any other bonuses. [Transcript pg. 88, lines 3-6].

While the commencement of paying discretionary bonus checks in January of 2016 should have been the subject of bargaining with the union, there is nothing to support the

allegation of the complaint that Respondent materially modified a preexisting discretionary bonus system by making bonus payments by check.

The termination of the discretionary bonus check payments in September of 2016 was not a change in wages requiring bargaining because the bonuses were only paid for a brief time.[3] The termination was sought to be discussed with the Union. Respondent notified the union of the plan to terminate the discretionary bonuses. The union did not respond to that notice. At that time Respondent was facing a severe economic crisis, including a loss of close to $1 million dollars and threats from its lenders to call outstanding loans [Transcript pg. 206, lines 9-11; pg 208, lines 7-12; 249 lines 11-20].

IV. CONCLUSION

Consistent with the authority cited herein and record evidence from the hearing, Respondent respectfully requests dismissal of the complaint.

Respondent, Bob's Tire Co., Inc.
By its attorney,

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[3] The bonus checks began in January of 2016 and ended in September. Bonuses are considered wages "if they are of such a fixed nature and have been paid over a specific length of time to have become a reasonable expectation of the employees, and therefore, part of this anticipated remuneration." *NLRB v. Nello Pestorese & Son, Inc.*, 500 F2d 399 (9th Cir. 1974). The payment of bonuses for 9 months is not of such a fixed nature as to raise to the level of an established term and condition. See: *Phelps Dodge Min. Co., Tyrone Branch v. N.L.R.B.*, 22 F.3d 1493 (1994).